IN THE

Supreme Court of the United States

October Term, 1941

No. .....

ANDREW GRANT ILSENG, JR., ANDREW G. ILSENG and LESLIE A. MCKERCHER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION.

Jurisdiction.

This Court has jurisdiction under Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925, 43 Stat. 938.

Judgments of the trial court were entered January 31, 1939 [R. pp. 108, 110, 112].

Opinion of Court Below.

The opinion of the Circuit Court of Appeals was rendered and filed June 13, 1941, a copy thereof is printed in the record at pages 840 to 853. It has not yet been printed in the Federal Reporter.

A petition for rehearing, filed in the Circuit Court of Appeals on July 12, 1941 [R. 857] was denied July 23, 1941 [R. 857], application for stay of mandate pending application in this Court for a writ of certiorari, was made and an order staying the mandate to and including August 25, 1941, pending the application for writ of certiorari was entered July 23, 1941 [R. 858].

Statement.

A full statement appears in the petition and, in the interest of brevity, is not repeated here.

Specifications of Error.

1. The Circuit Court of Appeals erred in holding that sufficient foundation had been laid for the introduction of the books and records and for the expert testimony based thereon as against (a) Ilseng, Sr. and (b) as against Ilseng, Jr. and McKercher.

2. The Circuit Court of Appeals erred in holding that the District Court was correct in overruling petitioners' objection to the introduction of the books and records in evidence upon the ground that no sufficient foundation had been laid for their introduction and the further objection that the books themselves could not be used to determine whether or not they had been kept in the regular and due course of business.

3. The Circuit Court of Appeals erred in holding that the evidence showed Ilseng, Jr. and McKercher were co-conspirators with Ilseng, Sr. and that therefore the books

and records and the expert testimony based thereon were properly admitted in evidence against all of the petitioners.

4. The Circuit Court of Appeals erred in holding that Section 695 of 28 U. S. C. A. is remedial only, as held in *Landay v. United States* [C. C. A. 6] 108 Fed. (2d) 698, and that in this case the foundation laid for the introduction in evidence of the books and records and the testimony based thereon was sufficient under said section; and said Circuit Court of Appeals erred in holding that that statute applied to all of the entries, whether those entries were made before or after the effective date of that statute and all of the entries therefore became admissible, and that the contrary holding on the same question made in *Valli v. United States* [C. C. A. 1] 94 Fed. (2d) 687 should not be followed.

ARGUMENT.

I.

The Holding by the Circuit Court of Appeals That Sufficient Foundation Was Laid for the Introduction in Evidence of the Books and Records and for the Expert Testimony Based Thereon, Seems Clearly Erroneous, as Does Also the Holding by the Circuit Court of Appeals That the District Court Was Correct in Overruling the Petitioners' Objection to the Use of the Entries in the Books Themselves to Determine Whether or Not the Books Had Been Kept in the Regular and Due Course of Business.

Specifications of Error numbers 1, 2 and 3 will be discussed hereunder.

It cannot be gainsaid that the most substantial part of the prosecution's case depended upon proof that dividends were improperly paid and that false representations were made as to the financial status of the companies. Without that proof, probably none of the petitioners could have been convicted. Without the evidence from those books and records, there is no proof that any dividends were improperly paid or that the representations made as to the financial status of the companies were false.

That the seized books and records were in the same condition at the time of trial in January, 1939, as they were in May, 1937, when Post Office Inspector Smith examined them, certainly does not establish anything as to the regularity or method of keeping of the books [R. 177].

That these books and records were kept by the company during the period of employment of Mr. Schupbach [R.

424] between April 2, 1934, and August 23, 1936 [R. 421], and in some of them he had made entries and in some others he had made no entries [R. 423] does not justify their introduction and use as evidence over the period from May, 1933, to September, 1937 [Myerson's testimony, R. 467]. The period was prior to, during and beyond Schupbach's employment.

That these books were "made available to" Mr. Reimer "for audit purposes" in May, 1937, and were used by Reimer for that purpose [R. 449], without any showing that they were so made "available" by any of the petitioners does not establish any foundation at all for their use in evidence.

The books and records were not competent as against the petitioner Ilseng, Sr. upon any ground of an admission by him, because there is no showing that he ever did admit that they were the books of the companies they purported to be, nor did he actually or tacitly admit that they were correct, nor is there a word of evidence to indicate that he had knowledge of their contents.

There is even less in the record to connect these books and records with the petitioners Ilseng, Jr. and McKercher. It must be conceded that neither the record nor the actual facts justify any statement that Ilseng, Jr. or McKercher had anything whatever to do with or knowledge of what they contained.

If the books are not admissible in the first instance as against any of the petitioners, it is difficult to understand how resort may be had to the *contents* of the books "to determine whether or not they had been kept in the regular, due course of business" as is, in effect, declared by

the Circuit Court of Appeals [Op. of C. C. A., R. 846]. The error seems clear.

If, for the reasons stated, the books are competent only as against Ilseng, Sr., and are only admissible against Ilseng, Jr. and McKercher on the theory of conspiracy, it is difficult to follow the argument of the Circuit Court of Appeals that resort may be had to the *contents* of the books to determine that the statements made and things done by Ilseng, Jr. and McKercher were unjustified, as shown by the books and records, and being so determined to be unjustified they (Ilseng, Jr. and McKercher) must have been "co-conspirators" with Ilseng, Sr. The logic seems bad and the error is obvious.

To illustrate: The Opinion of the Circuit Court of Appeals starts out with the premise that the books were admissible as against Ilseng, Sr. and proceeds to argue substantially as follows:

(1) That the trial court had found that McKercher and Ilseng, Jr. were co-conspirators with Ilseng, Sr.;

(2) That, therefore, the books were admissible as to them;

(3) That by the books themselves McKercher and Ilseng, Jr. knew of the bad financial condition of the companies, of the illegality of the dividend payments, of the worthlessness of the stock, etc., and,

(4) That therefore they became co-conspirators with Ilseng, Sr.

Such logic does not appear to us to be at all sound.

II.

The Holding of the Circuit Court of Appeals Seems Erroneous in Declaring (a) Even Where a Foundation for the Introduction in Evidence of Books and Records Is Not Sufficient Except Under the More Liberal Rule Laid Down in 28 U. S. C. A., Section 695, Entries Which Were Made in Such Books Earlier Than the Effective Date of That Statute Are, Nevertheless, Admissible; (b) That That Statute Is Remedial Only and Does Not Affect Any Substantive Right of One Accused of Crime; and (c) That of the Two Conflicting Opinions in Valli v. United States, 94 Fed. (2d) 687 and Landay v. United States, 108 Fed. (2d) 698, the Latter Is the Better Reasoned and Should Be Followed.

Specification of Error number 4 will be discussed hereunder.

Section 695 of 28 U. S. C. A., above referred to, is printed in full in the foregoing petition for writ of certiorari at pages 5-6 and, in the interest of brevity, is not reprinted here.

This same section is copied in full in the opinion of the Circuit Court of Appeals [R. 845].

This section does not abolish the rule of evidence that existed before the statute became effective and which required that before books and records are admissible in evidence they must first be shown to have been made in the regular course of business; in fact, the statute expressly confirms that old requirement. This the Circuit Court of Appeals seems to have completely overlooked.

As above pointed out, there is no showing in the entire record that such books were kept "in the regular course of business." Obviously, therefore, the statute avails nothing to the Circuit Court or to the prosecution. Simply stated, it is clear that if the books are shown to have been kept in the regular course of business they are admissible; if not so shown, they are not admissible.

As stated in *Greenbaum et al. v. United States* (C. C. A. 9), 98 Fed. (2d) 574, 578:

> "As a general rule, and in the absence of statute, unless it can be shown that the entries in the books sought to be introduced in evidence against one not a party chargeable with an interest in their keeping were either original entries or the first permanent entries of the transactions and kept in the regular course of business, the books are not admissible, as within the 'hearsay' rule."

This argument as to the admissibility of the books does not involve a question as to the sufficiency or insufficiency of the evidence to convict the petitioners, but has directly to do with the question as to whether or not Section 695 of 28 U. S. C. A. abrogates all rules heretofore existing making it necessary to lay some sort of foundation for the introduction into evidence of books and records.

Although the Circuit Court of Appeals in this opinion disagrees with the holding in *Valli v. United States*, 94 Fed. (2d) 687, and says, under the holding in that case, the entries in these books which predate the statute would be inadmissible, that same Circuit Court, in discussing

this identical statute, cited with approval this same case of *Valli v. United States.* (See *Greenbaum et al. v. United States* (C. C. A. 9), 98 Fed. (2d) 574, 578.)

Landay v. United States (C. C. A. 6), 108 Fed. (2d) 698, which this Circuit Court says has a "better reasoned" opinion than does *Valli v. United States,* is hardly a convincing authority against the petitioners' contentions that the entries which predate the statute are not admissible, because in *Landay v. United States,* in passing upon the sufficiency of the identification of the books which had been received in evidence, the Court said:

> "The proof satisfied the test laid down by this Court in Johnson v. United States, 6 Cir., 89 F. (2d) 913."

The test laid down in *Johnson v. United States, supra,* is declared in the opinion as follows:

> "It is not necessary to the admissibility in evidence of a memorandum or note of a transaction that it be identified by the person who made the original entry. If it is the first permanent record, the identification may be made by the one who has the custody or control of it or had general authority over the making of it."

This case of *Johnson v. United States* was decided in April, 1937, about nine months later than the enactment of 28 U. S. C. A. 695. No such showing as is required under the authority of *Johnson v. United States, supra,* was made in the instant case.

Conclusion.

The questions here submitted are surely of great importance. Upon their proper answer may depend the life or liberty of persons accused of crime. Post rationalization to the effect that the books are admissible only if a conspiracy exists, and that the books themselves show guilty knowledge, and therefore a conspiracy, and for that reason the books are admissible, ought not to be indulged. The changing of the rules of evidence touching book entries by resorting to a statute which expressly declares it "shall be prospective only and not retroactive" has denied to the petitioners due process of law in permitting to be used against them evidence of a character not permitted by law at the time when the alleged wrongful acts were committed.

Because this case is one calling for the exercise by this Court of its supervisory powers the writ of certiorari should issue.

Respectfully,

DAVID H. CANNON,
Attorney for Petitioners.